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8 UNITED STATES DISTRICT COURT
9 CENTRAL DISTRICT OF CALIFORNIA
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11 KEVIN SO,) Case No. CV 08-03336 DDP (AGRx)
12)
13 Plaintiff,) **ORDER DENYING DEFENDANT LOPATIN'S**
14) **MOTION TO DISMISS FOR FAILURE TO**
15 v.) **STATE A CLAIM, MOTION TO DISMISS**
16) **FOR IMPROPER VENUE, AND MOTION TO**
17 LAND BASE, LLC; UNIVEST) **COMPEL ARBITRATION**
18 FINANCIAL SERVICES, INC.;)
BORIS LOPATIN, individually) [Motion filed on October 16,
and d/b/a BORIS LOPATIN) 2009]
ASSOCIATES and CHARLES W.)
WOODHEAD,)
Defendants.)
_____)

19 This matter comes before the Court on a Motion to Dismiss
20 filed by the defendant Boris Lopatin ("Lopatin"), appearing pro se.
21 After reviewing the papers submitted by the parties and considering
22 the arguments raised therein, the Court DENIES the motion and
23 adopts the following order.

24 **I. BACKGROUND**

25 The plaintiff Kevin So ("Plaintiff"), a wealthy businessman
26 living in Hong Kong, alleges that he was duped by several
27 conspiring co-defendants, including Lopatin, into investing \$30
28 million in an elaborate Ponzi scheme known as the Private

1 Placement Project. (Second Amended Complaint ("SAC") ¶¶ 22, 39.)
 2 Plaintiff asserts a number of causes of action against Lopatin and
 3 the other defendants, including, among others, fraud, conversion,
 4 and unjust enrichment.

5 Lopatin, appearing pro se, has filed what is styled as a
 6 Motion to Dismiss the SAC.¹ The motion asserts that the SAC should
 7 be dismissed because (1) Plaintiff lacks standing, (2) Plaintiff and
 8 Lopatin are parties to a binding arbitration agreement, and (3)
 9 venue is improper. Because courts have a duty to construe pro se
 10 motions liberally, the Court construes Lopatin's motion as (1) a
 11 motion to dismiss for failure to state a claim under Federal Rule
 12 of Civil Procedure 12(b)(6) based on Plaintiff's lack of standing;
 13 (2) a motion to dismiss for improper venue pursuant to Federal Rule
 14 of Civil Procedure 12(b)(3); and (3) a motion to compel
 15 arbitration.

16 **II. DISCUSSION**

17 **A. Motion to Dismiss for Failure to State a Claim**

18 **1. Legal Standard**

19 A complaint will survive a motion to dismiss when it
 20 "contain[s] sufficient factual matter, accepted as true, to state a
 21 claim to relief that is plausible on its face." Ashcroft v. Iqbal,
 22 129 S. Ct. 1937, 1949 (2009) (quoting Bell Atl. Corp. v. Twombly,

24 ¹Lopatin purports to file his motion on behalf of Land Base,
 25 LLC, and Boris Lopatin Associates. (See, e.g., Reply 2:6-8.)
 26 However, pursuant to Local Rule 83-2.10.1, "[a] corporation
 27 including a limited liability corporation, a partnership including
 28 a limited liability partnership, an unincorporated association, or
 a trust may not appear in any action or proceeding pro se." The
 Court therefore considers this motion to have been filed on behalf
 of Lopatin individually and not on behalf of Land Base, LLC, or
 Boris Lopatin Associates.

1 550 U.S. 544, 570 (2007)). When considering a 12(b)(6) motion, a
2 court must "accept as true all allegations of material fact and
3 must construe those facts in the light most favorable to the
4 plaintiff." Resnick v. Hayes, 213 F.3d 443, 447 (9th Cir. 2000).
5 Although a pleading need not include "detailed factual
6 allegations," it must be "more than an unadorned, the-defendant-
7 unlawfully-harmed-me accusation." Iqbal, 129 S. Ct. at 1949.
8 Conclusory allegations or allegations that are no more than a
9 statement of a legal conclusion "are not entitled to the assumption
10 of truth." Id. at 1950. In other words, a pleading that merely
11 offers "labels and conclusions," a "formulaic recitation of the
12 elements," or "naked assertions" will not be sufficient to state a
13 claim upon which relief can be granted. Id. at 1949 (citations and
14 internal quotation marks omitted).

15 "When there are well-pleaded factual allegations, a court
16 should assume their veracity and then determine whether they
17 plausibly give rise to an entitlement of relief." Id. at 1950.
18 Plaintiffs must allege "plausible grounds to infer" that their
19 claims rise "above the speculative level." Twombly, 550 U.S. at
20 555-56. "Determining whether a complaint states a plausible claim
21 for relief" is "a context-specific task that requires the reviewing
22 court to draw on its judicial experience and common sense." Iqbal,
23 129 S. Ct. at 1950.

24 2. Analysis

25 Lopatin argues that Plaintiff lacks standing because he has
26 not produced evidence that he in fact lost \$30 million and "the
27 true source of the then invested funds is unquestionably in
28 dispute, and of grave concern." (Mot. 3:21-22.)

1 In order to satisfy Article III's standing requirements, a
2 plaintiff must show:

3 (1) it has suffered an injury in fact that is (a) concrete
4 and particularized and (b) actual or imminent, not
5 conjectural or hypothetical; (2) the injury is fairly
6 traceable to the challenged action of the defendant; and (3)
7 it is likely, as opposed to merely speculative, that the
8 injury will be redressed by a favorable decision.
9 Friends of the Earth, Inc. v. Laidlaw Env'tl. Servs., Inc., 528 U.S.
10 167, 180-81 (2000) (internal quotation marks omitted). At the
11 motion to dismiss stage, allegations are presumed to be correct,
12 and thus "general factual allegations of injury resulting from the
13 defendant's conduct may suffice" to establish the prerequisites for
14 standing. Lujan v. Defenders of Wildlife, 504 U.S. 555, 561
15 (1992).

16 Plaintiff has alleged that he invested in the Private
17 Placement Project and that, as a result, he suffered a financial
18 loss nearly equaling his \$30 million investment. (SAC ¶¶ 22, 39.)
19 At the motion to dismiss stage, these allegations are sufficient to
20 establish Plaintiff's standing. Lujan, 504 U.S. at 561.
21 Therefore, Lopatin's motion to dismiss pursuant to Federal Rule of
22 Civil Procedure 12(b)(6) is denied.

23 **B. Motion to Dismiss for Improper Venue**

24 **1. Legal Standard**

25 Where subject matter jurisdiction is based on diversity of
26 citizenship, venue is proper in:

27 (1) a judicial district where any defendant resides, if
28 all defendants reside in the same State, (2) a judicial
district in which a substantial part of the events or
omissions giving rise to the claim occurred, or a
substantial part of property that is subject of the
action is situated, or (3) a judicial district in which
any defendant is subject to personal jurisdiction at the
time the action is commenced, if there is no district in
which the action may otherwise be brought.

1 28 U.S.C. § 1391(a). A motion to dismiss based on a forum
2 selection clause is treated as a Rule 12(b)(3) motion to dismiss
3 for improper venue. See Arqueta v. Banco Mexicano, S.A., 87 F.3d
4 320, 324 (9th Cir. 1996). When considering a Rule 12(b)(3) motion,
5 the district court need not accept the pleadings as true, Richards
6 v. Lloyd's of London, 135 F.3d 1289, 1292 (9th Cir. 1998), and may
7 consider facts outside of the pleadings, Arqueta, 87 F.3d at 324.
8 In the event of any material disputes of fact, the district court
9 must draw all reasonable inferences in favor of the non-moving
10 party. Murphy v. Schneider National, Inc., 362 F.3d 1133, 1140
11 (9th Cir. 2004) (internal quotations omitted).

12 2. Analysis

13 In connection with the alleged Ponzi scheme, Plaintiff and
14 Land Base, LLC entered into a Private Enterprise Assets Exchange
15 Benefits Participation Agreement (the "Land Base Agreement").
16 (Opp. Ex. A.) Article 5 of the Land Base Agreement provides that
17 "[t]he Law of England and Wales shall be the proper Law . . . with
18 exception of Article 4 that is to be governing [sic] by the Laws of
19 District Columbia, USA [sic]." (Id.)

20 Lopatin appears to argue that this is a forum selection clause
21 and that venue may only be laid in England. As an initial matter,
22 the Court notes that Lopatin does not appear to be a party to the
23 Land Base Agreement. Although he signed the Agreement, he did so
24 in his representative capacity as an officer of Land Base, LLC, and
25 not in his individual capacity. Therefore, the Court is not
26 convinced that Lopatin has standing to enforce any purported forum
27 selection clause contained within the Land Base Agreement.

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1 However, even assuming arguendo that he has standing to
2 enforce the terms of the Land Base Agreement, the clause at issue
3 is a choice-of-law provision rather than a forum selection clause.
4 See, e.g., 17 Am. Jur. 2D Contracts § 259 (defining a forum
5 selection clause as one that "designates a particular state or
6 court as the jurisdiction in which the parties will litigate
7 disputes arising out of the contract"); id. § 261 (defining a
8 choice-of-law provision as one that "names a particular state and
9 provides that the substantial laws of that jurisdiction will be
10 used to determine the validity and construction of the contract").

11 Aside from this choice-of-law provision, Lopatin has failed to
12 articulate why venue is improper. The Court is satisfied that
13 venue is properly laid in this judicial district either on the
14 basis of 28 U.S.C. §1391(a)(2) or (a)(3). Therefore, Lopatin's
15 Motion to Dismiss for Improper Venue is denied.

16 **C. Motion to Compel Arbitration**

17 1. Legal Standard

18 The Federal Arbitration Act embodies a federal policy in favor
19 of arbitration, and any doubts concerning the scope of arbitrable
20 issues should be resolved in favor of arbitration. Simula, Inc. v.
21 Autoliv, Inc., 175 F.3d 716, 719 (9th Cir. 1999). The Federal
22 Arbitration Act provides:

23 If any suit or proceeding be brought in any of the courts
24 of the United States upon any issue referable to
25 arbitration under an agreement in writing for such
26 arbitration, the court in which such suit is pending, upon
27 being satisfied that the issue involved in such suit or
28 proceeding is referable to arbitration under such an
 agreement, shall on application of one of the parties stay
 the trial of the action until such arbitration has been had
 in accordance with the terms of the agreement, providing
 the applicant for the stay is not in default in proceeding
 with such arbitration.

1 9 U.S.C. § 3. Under the FAA, the court's role "is therefore
2 limited to determining (1) whether a valid agreement to arbitrate
3 exists and, if it does, (2) whether the agreement encompasses the
4 dispute at issue." Chiron Corp. v. Ortho Diagnostic Sys., Inc.,
5 207 F.3d 1126, 1130 (9th Cir. 2000).

6 2. Analysis

7 Article 4 of the Land Base Agreement, which contains terms
8 relating to non-disclosure of confidential information, provides
9 that "[a]ny controversy or claim arising out of or relating to this
10 Transaction Code . . . regarding herein Article 4 Non-disclosures
11 and / or non-circumvention, Good Faith which is not settled by the
12 Parties, shall be subject to binding arbitration." (Id.)

13 For the reasons set forth above, the Court again notes that
14 Lopatin may not enforce an purported arbitration agreement to which
15 he is not a party. Britton v. Co-Op Banking Group, 916 F.2d 1405,
16 1413 (9th Cir. 1990) (holding that because the right to compel
17 arbitration is contractual, "one who is not a party to a contract
18 has no standing to compel arbitration").

19 In any event, however, the arbitration provision contained in
20 the Land Base Agreement pertains only to disputes "regarding herein
21 Article 4 Non-disclosures and/ or non-circumvention, Good Faith."
22 (Opp. Ex. A, Art. IV.) Although broad arbitration clauses should
23 be read expansively, "when an arbitration clause by its terms
24 extends only to a specific type of dispute, . . . a court cannot
25 require arbitration on claims that are not included." Simon v.
26 Pfizer, 398 F.3d 765, 775 (6th Cir. 2005). The court must "look
27 past the labels the parties attach to their claims to the
28 underlying factual allegations and determine whether they fall

1 within the scope of the arbitration clause." 3M Co. v. Amtex
2 Security, Inc., 542 F.3d 1193, 1199 (8th Cir. 2008). The present
3 lawsuit is not a dispute regarding disclosure of confidential
4 information; rather, it is a case alleging that Lopatin and others
5 conspired to defraud Plaintiff out of \$30 million. Plaintiff's
6 claims fall outside of the scope of the arbitration clause.

7 Therefore, because (1) it is not clear Lopatin has standing to
8 enforce the terms of the Land Base Agreement in his individual
9 capacity and (2) this case falls outside the scope of the
10 arbitration clause, Lopatin's Motion to Compel Arbitration is
11 denied.

12 **III. CONCLUSION**

13 For the foregoing reasons, Lopatin's motion to dismiss for
14 failure to state a claim, motion to dismiss for improper venue, and
15 motion to compel arbitration are DENIED.

16 IT IS SO ORDERED.

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19 Dated: December 16, 2009


DEAN D. PREGERSON
United States District Judge